No. 09-949

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOYCE K. MATSUO, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982)	4
City of San Diego v. Roe, 543 U.S. 77 (2004)	5
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993)	7
Fulton Corp. v. Faulkner, 516 U.S. 325 (1996)	4
Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)	7
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	5
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)	4, 5
Powell v. McCormack, 395 U.S. 486 (1969)	4
United States v. Williams, 504 U.S. 36 (1992)	7
Zobel v. Williams, 457 U.S. 55 (1982)	7
Zobrest v. Catalina Foothills Sch. District, 509 U.S. 1 (1993)	6

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ARGUMENT

The United States, in its opposition brief, makes a number of unsubstantiated and, in some cases, false arguments that cannot be left unaddressed.

The Government contends that review of Petitioners' claim is unnecessary because of the enactment of a 2009 amendment to the Federal Employees' Pay Comparability Act ("FEPCA") which provides that, after a three-year phase in period, Federal employees in Alaska and Hawaii will receive locality pay. According to the Government, once this legis-

lation is fully implemented in 2012, "petitioners will have no further personal stake in the resolution of the constitutional claims they assert, and their remaining claims will become moot." Opp. Brief 7. These statements are both factually and legally incorrect.

The Government's assertion that Petitioners have no claim for damages and back pay arising from the violation of their constitutional rights is simply false, as is the Government's statement that "an appeal of that aspect of [the District Court's] decision was dismissed." Opp. Brief 7. To the contrary, the Petitioners in this case seek damages emanating from the Government's unconstitutional scheme of denying locality pay based exclusively on the state in which one resides. Indeed, in its attempt to transfer jurisdiction from the District Court to the Court of Claims, the Government found that the damages resulting from these violations for current and former employees of the Government residing in Hawaii and Alaska were easily quantifiable, estimating that "nearly half the putative class of Alaskan and Hawaiian federal employees [] would have claims over $10,000." App. 3a. The District Court rejected the Government's attempt to transfer the case not because no damages are being sought for the constitutional violations, but because, under well settled law, the Court of Claims does not have jurisdiction over Federal employees' constitutional claims, even where they seek damages, if the underlying nature of the case is a challenge that a statute is unconstitutional. As the District Court explained, "the Court of Claims does not possess exclusive jurisdiction over a suit simply because the requested non-monetary relief may form the basis for a later monetary judgment against the Government." App. 8a. Accordingly, if the FEPCA

exclusion is found to be unconstitutional, the Petitioners in Hawaii and Alaska would be entitled to damages which would include the difference between what they were paid and what they would have been paid had they received the locality pay mandated by the statute.

It is also important to note that it was the ***Government*** that appealed the District Court's decision regarding jurisdiction, and it was the Government's decision not to pursue that appeal that led to its voluntary dismissal. *See* District Court's Docket Entry Nos. 33 & 36. For the Government now to imply that it was Petitioners who appealed a decision denying damages mischaracterizes the record. Petitioners have always sought – and continue to seek – damages for the Government's unconstitutional denial of locality pay to current and former Federal employees residing in Hawaii or Alaska.

In light of the foregoing, it is disingenuous of the Government to argue that this Court's review of the significant constitutional issues presented by this case is unwarranted merely because Congress has seen fit to amend its flawed statute. At the outset, the 2009 amendment did not "deprive this case of any prospective significance," as argued by the Government (Opp. Brief 7), for the simple reason that it will not even be fully implemented until 2012, and it does nothing to remedy the monetary damages suffered by the Petitioners who were, and are, employed in Alaska and Hawaii prior to this date.

Indeed, this Court has held that the repeal or amendment of a statute while an appeal is pending from a decision addressing its constitutionality does not necessarily divest it of authority to rule on the constitutional questions implicated by the appeal.

See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288-89 (1982) (concluding that the appeal from a case challenging the constitutionality of an ordinance was not mooted by its amendment while the case was pending in the Court of Appeals). This is certainly true in the instant case because the amendment to FEPCA did not retroactively cure the damages suffered by the Petitioners as a result of its original enactment and application. For instance, in *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327 n.1 (1996), this Court rejected the notion that the repeal of a statute imposing a tax that violated the Commerce Clause divested the Court of jurisdiction to consider the constitutionality of the tax, for the simple reason that the repeal had no retroactive effect, and a "justiciable controversy" therefore remained with respect to the tax years at issue in the litigation. *See also Powell v. McCormack*, 395 U.S. 486, 498-500 (1969) (holding that petitioner's claims alleging that he was deprived of his seat in Congress by virtue of an unconstitutional Congressional resolution was not rendered moot by his subsequent seating where his claim for lost salary remained unresolved). Accordingly, the Government's attempt to deflect this Court's attention from the significant constitutional issues raised by this petition based upon the 2009 amendment to FEPCA is unfounded, and should be rejected.

The Government also argues that this case does not warrant this Court's consideration because the Petitioners "are free to leave federal employment if the pay and benefits they receive are unsatisfactory." Opp. Brief 7. Citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), the Government further contends that "nothing in the Constitution requires Congress to guarantee that federal employ-

ment will be available to petitioners on the same terms everywhere in the country." Opp. Brief 7-8. These arguments completely miss the point of the Petitioners' allegations. Indeed, the *Murgia* case ***supports***, rather than undermines, the Petitioners' position in this case.

Petitioners are not claiming, nor have they ever claimed, that they enjoy heightened constitutional protection merely by virtue of their Federal employment. As this Court has repeatedly held, however, a public employee does not ***relinquish*** Federal constitutional rights "just by reason of his or her employment." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967) (recognizing the established principle that public employees may not be required to surrender their constitutional rights as a condition of employment). This principle was affirmed in *Murgia*, which simply held that an age-based classification did not offend the equal protection rights of the public employees to whom it was applied. In reaching this conclusion, the Court provided specific examples of legislative classifications that, if applied to public employees, ***would*** be subject to heightened judicial scrutiny because they infringed upon "fundamental" rights, ***including*** the right to interstate travel. *Murgia*, 427 U.S. at 312 n.3.

Accordingly, even though the Federal government may exercise discretion in establishing the terms and conditions of its employees, it cannot do so in a manner that violates their constitutional rights. The Government's suggestion that Petitioners' allegations should not be heard because they are "free to leave" their employment is therefore entirely unfounded. Surely the Government would not argue that, be-

cause no Federal employee is constitutionally entitled to any particular benefit of employment, it is entitled to provide such benefits in a racially discriminatory manner. By the same token, the Government cannot, and should not, distinguish among its employees in a way that burdens their constitutional right to travel.

In opposing Petitioners' claims, the Government also argues that Petitioners "forfeited" their equal protection claims before the Court of Appeals because "their appellate briefs pressed no equal protection argument distinct from their right-to-travel claim." Opp. Brief 9. As Petitioners pointed out in their opening brief, however, they explicitly argued in their appellate briefs that FEPCA's exclusions offended the Equal Protection clause. *See* Petition for a Writ of Certiorari at 21-22. Moreover, the Court of Appeals, while erroneously concluding that the Petitioners did not raise an equal protection claim in their briefs, nonetheless addressed this argument by concluding that FEPCA "clearly satisfies rational-basis scrutiny for the reasons stated by the district court." App. 66a n.8.

The Government has neither disputed these points nor cited any authority that would preclude this Court from considering this important question. In the only case cited by the Government to support its argument on this issue – *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) – the Court refused to consider non-constitutional grounds for affirming the lower court's decision where neither party raised any such arguments before the District Court ***or*** the Court of Appeals, and neither court's decision addressed any non-constitutional questions. *Id.* at 7-8. The Court's holding in *Zobrest* does not preclude this Court from considering Petitioners' equal protection

arguments, insofar as Petitioners clearly raised this claim before both the District Court and the Court of Appeals, and this issue was addressed in both courts' decisions. Indeed, in *United States v. Williams*, 504 U.S. 36, 41 (1992), this Court clarified that its "traditional rule" precludes certiorari review ***only*** when "the question presented was not pressed or passed upon below." The Court emphasized that this rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon" by the lower courts. *Id.* As demonstrated, Petitioners have clearly satisfied this test with respect to preserving their equal protection arguments for certiorari review.

Finally, the Government has argued (Opp. Brief 10) that FEPCA "clearly" survives the rational basis standard as articulated by this Court in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), under which those challenging the constitutionality of a statute "have the burden 'to negative every conceivable basis which might support it.'" *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Remarkably, by merely parroting the Court of Appeals' conclusion on this point, the Government failed to rebut – and indeed completely ignored – Petitioners' argument that FEPCA's exclusion of Federal employees residing in Alaska and Hawaii does not survive the less deferential rational basis standard of review that has ***actually been applied*** by this Court to other residency-based statutes. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618-23 (1985); *Zobel v. Williams*, 457 U.S. 55, 60-65 (1982). The Government's silence on this point can only be construed as an implicit admission that the challenged exclusion

would not survive scrutiny under this well-established line of cases.

CONCLUSION

While each of the foregoing arguments by the Government is easily rebutted, it is important to note that the underlying significance of the questions presented in this case has not been denied. If left undisturbed, the lower courts' rulings will leave Congress free to deny Federal benefits to Federal citizens based solely, and explicitly, on the state in which they reside. The eleventh-hour amendment of FEPCA does not resolve this constitutional dilemma, nor does it divest this case of its fundamental importance. Only by granting certiorari review, and reversing the Court of Appeals' ruling, can this Court correct this glaring hole in Federal constitutional jurisprudence.

Respectfully submitted,

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